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No. 728.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS,

v.

THE STATE OF NEW MEXICO.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

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From the bill exhibited by the plaintiff, the following facts appear (R. 1–18):

By the Act of June 21, 1898, ch. 489, 30 Stat. 484, § 1, there were granted to the Territory of New Mexico, for the support of common schools, sections sixteen and thirty-six in each township, and for such sections as were mineral or had been otherwise disposed of, other non-mineral lands equivalent thereto were granted as indemnity. Such indemnity was to be selected from the unappropriated lands within the Territory by a commission of State officials, acting under the direction of the Secretary of the Interior. Section 8.

The Enabling Act of June 20, 1910, ch. 310, 36 Stat. 557, in section 6 (p. 561), granted to the proposed State of New Mexico for school purposes sections two and thirty-two in each township in addition to sections sixteen and thirty-six theretofore granted to the Territory of New Mexico, and that section contained provisions as follows:

> and where sections two, sixteen, thirty-two and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and

> seventy-six of the Revised Statutes are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein; * * *: *And provided further*, That the grants of sections two, sixteen thirty-two and thirty-six to said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, * * *.

Section 11 of that Act provided that all lands granted as indemnity should be selected under the direction and subject to the approval of the Secretary of the Interior.

Sections 2275 and 2276, Revised Statutes of the United States, as amended by the Act of February 28, 1891, ch. 384, 26 Stat. 796 (U. S. Comp. Stats. 1916, Ann., §§4860 and 4861), referred to in section 6 of the Enabling Act, provide that where settlements with a view to preemption or homestead have been made prior to survey on sections sixteen or thirty-six, or where such sections are mineral or have been included within any reservation or otherwise disposed of by the United States, other lands non-mineral in character may be selected in lieu thereof.

Under the authority of these Acts, the State of New Mexico, on March 9, 1915, filed in the local land office at Roswell, New Mexico, a selection list for a certain

tract of land, assigning as base therefor a part of a certain section thirty-six, the title to which was vested in the State but which subsequently had been included within the exterior boundaries of the Sacramento National Forest (later named the Alamo National Forest). With this selection list there was tendered what is termed in the bill "a deed by quitclaim" executed by the State covering the base land (Par. XV of bill, R. 12), and which it is alleged was "a perfect deed of conveyance" to the United States of the State's interest in said base land. Par. XVI of bill, R. 13. This "quitclaim" is set forth as a part of the answer. R. 23B.

When the list was taken up for consideration by the Commissioner of the General Land Office, it was held for rejection on the ground that there was no valid base to support it, the land assigned as base having, since the filing of the application, been eliminated from the Alamo National Forest. R. 25.

From that decision the State appealed to the Secretary of the Interior, who affirmed the decision of the Commissioner. R. 26. A motion for rehearing was denied (R. 26, 27), as was a petition for the exercise of supervisory power. R. 28–34.

The answer of the defendants (R. 19–23) admitted most of the allegations of the bill but raised an issue as to the sufficiency of the alleged "quitclaim" of the base land by the State. It was asserted that the power of the Secretary of the Interior to approve a selection application such as the one tendered depended upon whether the base land was within a

national forest; that if it were not, the Secretary had no power to approve the application; that when the selection list came to the Secretary for action he found and determined that the land assigned as base had been excluded from the National Forest and that it afforded no sufficient or proper base for the selection application; that such action was taken in a matter within his jurisdiction and involved the exercise of judgment and discretion. It was further asserted that the determination of the matters of law and fact presented and the granting of the relief sought by the bill involve the title to the land in controversy, and that the United States is a necessary party to the suit.

The case was heard on the bill and answer, and a decree was entered against the defendants by the Supreme Court of the District granting substantially the relief sought by the bill. R. 43, 44. Opinion, R. 34–43.

Upon appeal, the Court of Appeals affirmed the decree. R. 48. Opinion, R. 47, 48; 258 Fed. 980. Whereupon the case was brought to this court.

ASSIGNMENT OF ERRORS.

The assignment of errors is as follows (R. 49, 50):

> 1. That the court erred in affirming the decree of the Supreme Court of the District of Columbia and in not reversing the same.
>
> 2. That the court erred in holding that the filing of a selection list by the appellee operated as a waiver of its title to the base land, as a conveyance of the equitable title therein

to the United States, and as securing to said appellee a vested right or interest in and to the selected land.

3. That the court erred in not holding that until a State's selection list is approved by the Secretary of the Interior, as provided by law, no property rights in lieu lands, as against the United States, becomes vested in the State.

4. That the court erred in not holding, where land to which the State has complete legal title is offered as base because it falls within the outboundaries of a natural [national] forest created subsequently to the State's acquirement of full legal title, and where, prior to approval by the Secretary of the Interior, the exterior lines of such natural [national] forest are changed so that said base land is no longer within said outboundaries, that the Secretary of the Interior is without authority of law to proceed to effect an exchange under the provisions of sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat. 796).

5. That the court erred in taking jurisdiction to review directly the decision of the Secretary of the Interior in a matter committed by law exclusively to his jurisdiction and involving the exercise of his judgment and discretion, and in ordering the substitution therefor of the court's judgment and opinion.

6. That the court erred in not holding that the United States is a necessary party to this suit.

Under this assignment we submit the following propositions:

1. Until approval, no title, legal or equitable, vests in the State under a lieu or exchange selection application.

2. The power of the Secretary of the Interior in passing upon such an application is not limited to a consideration of conditions existing at the time of the filing of such application but properly extends to conditions existing at the time the application is taken up for examination.

3. The United States is a necessary party to this suit since the effect of the decree below is to divest it of title to the land in controversy.

ARGUMENT.

I.

Until approval, no title, legal or equitable, vests in the State under a lieu or exchange selection application.

The case of *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, involved a lieu or exchange selection application under the so-called Forest Reserve Act of June 4, 1897, ch. 2, 30 Stat. 11, 36, sec. 1, which provided that one holding an unperfected claim, or a patent to lands in a forest reservation, might relinquish said lands and select an equal area of nonmineral lands from the vacant public domain. It will be seen that that Act was strikingly like the Act here under consideration. It was asserted in that case that upon the filing of a relinquishment of the lands claimed or owned with

an application to select other lands the selector secured an equitable title to the selected lands.

Upon this point this court said (p. 312):

> We do not see how it can be successfully maintained that, without any decision by any official representing the Government, and by merely filing the deed relinquishing to the Government a tract of forest reserve land and assuming to select a similar area of vacant land open to settlement, the selector has thereby acquired a complete equitable title to the selected land. The selector has not acquired title simply because he has selected land which he claims was at the time of selection vacant land open to settlement, nor does the filing of his deed conveying the land relinquished and the abstract of title with it show necessarily that he was the owner of the land as provided for by the statute. So far as his action goes, it is an assertion on his part that he was the owner in fee simple of the land he proposed to relinquish, and that the deed conveys a fee simple title to the Government, and also that he has selected vacant land which is open to settlement, and that therefore he is entitled to a patent for such land.

And again, at page 313:

> Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms, and the further fact that the Land Department had adopted rule 18, above referred to, which provides for the

> forwarding of all applications for change of entry or settlement to the Commissioner of the General Land Office for his consideration, together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector, so that he became vested with the equitable title to land he assumed to select. It is certain, as we have already remarked, there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it. Under the rule above cited that decision has not been made. The General Land Office has (so far as this record shows) come to no conclusion in regard to it.

And further, at pages 314, 315:

> What may be the decision of the Land Department upon these questions in this case, cannot be known, but until the various questions of law and fact have been determined by that department *in favor of complainant* it cannot be said that it has a complete equitable title to the land selected. [Italics ours.]

The Supreme Court of Oregon, in the case of *State* v. *Hyde*, 88 Oreg. 1, considered the question as to title acquired by selection applications under the Forest Reserve Act. It was said, speaking of the decision of this court in *Cosmos Co.* v. *Gray Eagle Oil Co.*, *supra* (pp 15, 16):

> The court in that case was concerned particularly with the question of whether an equitable title to the selected lands had passed

to the applicants. But the decision is instructive on the effect of a deed to the base lands. It is held that although the act of 1897 is a standing offer by the United States to exchange one class of lands for another, the exchange is not effected by the mere filing of the papers. In *Clearwater Timber Co.* v. *Shoshone County*, 155 Fed. 612, 620, it is held that title to the selected lands does not pass until final approval of the selection by the Commissioner of the General Land Office. If the title to the selected lands cannot vest in the applicant without acceptance of the base lands by the General Land Office, it is fairly inferable that title to the base lands cannot pass to the United States until this bureau accepts the transfer. It is said in *Pacific Live Stock Co.* v. *Isaacs*, 52 Or. 54, 64 (96 Pac. 460), that:

"Neither party acquires any legal or equitable title in the lands proposed to be exchanged until the acceptance or final consummation thereof."

The construction which we place upon the decision in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, accords with its construction by the Interior Department * * *.

It is squarely held by the federal court for this district in *United States* v. *McClure*, 174 Fed. 510, that title to the base lands does not pass to the United States until the deed is accepted by the General Land Office.

We believe the principle laid down as to the vesting of title under a railroad indemnity selection application is controlling here, for there is a strong analogy

between them. It is well settled as to railroad indemnity selection applications that no title vests until the application to select is made *and* approved by the Secretary of the Interior. *Sioux City & St. Paul R. R. Co.* v. *Chicago, M. & St. P. Ry. Co.*, 117 U. S. 406, 408; *Northern Pac. Ry. Co.* v. *McComas*, 250 U. S. 387, 391, 392.

We regard as pertinent to applications such as the one here in question what was said concerning railroad indemnity selections by this court in *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496, at pp. 511, 512:

> The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any preemption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for

> the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts.

In the case of *Buena Vista Land & Development Co.* v. *Honolulu Oil Co.*, 166 Calif. 71, the Supreme Court of California held that under a selection application by the State, made under the same statute as the one here in question, no title passes nor is any vested right acquired thereunder until the application is approved by the Secretary of the Interior. The court in deciding the case approved

and adopted the decision of the Secretary of the Interior in a contest involving the same matter.

To the same effect are *Roberts* v. *Gebhart*, 104 Calif. 67, 69, 70, 71, and the holding of the Supreme Court of Minnesota in *Baker* v. *Jamison*, 54 Minn. 17, 27, 28.

It is necessary to bear in mind that there is a clear distinction between the filing of an application to select and an approved selection. The word "selection" is often commonly used to refer to an application to select and from that arises a misapprehension as to what is meant in many of the adjudicated cases by the expression that title under such a filing vests upon selection. In such cases the word "selection" means approved selection. As was said in *Wisconsin Cent. R. R. Co.* v. *Price County*, *supra* (p. 514): "They [selections] are not considered as made *until they have been approved, as provided by statute, by the Secretary of the Interior.*" [Italics ours.]

II.

The power of the Secretary of the Interior in passing upon such an application is not limited to a consideration of conditions existing at the time of the filing of such application but properly extends to conditions existing at the time the application is taken up for examination.

It is asserted by appellee that as the State had performed all the conditions requisite in connection with its selection application, its rights thereunder must be determined as of that time, that is, the date of filing; that as the base was valid then, the sub-

sequent elimination of it from the National Forest did not invalidate it and there being no other ground of objection the application must be approved.

We recognize the well established rule that a claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the Government and that his right to a legal title is to be determined as of that time. But that rule is based upon the theory that by virtue of his compliance with the requirements he has an *equitable title* to the land; that in equity it is his and the Government holds it in trust for him. *Wirth* v. *Branson*, 98 U. S. 118, 121; *Cornelius* v. *Kessel*, 128 U. S. 456, 459; *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 432–434.

That rule, however, cannot be made applicable to this case. The *approval*, not the *filing* of an application creates the equitable title. As the application had not been approved, no equitable title vested and the matter was therefore open for determination as of the time when presented to the Secretary and not limited to conditions existing at the date of filing.

If the Secretary's power in passing upon a selection application such as this were limited to a consideration of conditions existing at the date of *filing*, then the fact that mineral land was selected would not warrant his withholding approval, if the land were not known to be mineral at date of filing, regardless of the fact that later on and before the filing was acted upon by the Secretary the mineral

character of the land became known. This view must rest on the assumption that the equitable title vested as of the date the list was filed, but, as we have already pointed out, equitable title does not vest until approval. We have fully discussed the point, also, in the brief submitted in the case of *Payne, Secretary*, v. *Central Pacific Railway Company*, No. 17, which was argued immediately prior to this case, and we invite the court's attention to what was said there on that point (pages 9–13), particularly since the Court of Appeals in the instant case followed its decision in the *Central Pacific* case.

Now, it matters not that in this case the objection to the selection relates to the *base* and not to the *selected* land. The rule as to the scope of the Secretary's inquiry is the same in either case, and the vestiture of title as to both is necessarily concurrent.

It is sought to invoke the doctrine of relation in this case, but it is clearly inapplicable. As there was no approval there was nothing to give rise to, or to set in operation, the doctrine of relation. The legal fiction that an act performed on a certain date is deemed to have taken place on an antecedent date may not be indulged if the act is never performed.

It is in this respect that the instant case is distinguishable from *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380. In that case the indemnity selection of the railroad

company had been approved by the Secretary, and hence it was held that the title so acquired by the approval related back to the initiation of proceedings which resulted in approval, that is, back to the *filing*.

The case of *Daniels* v. *Wagner*, 237 U. S. 547, is said to be applicable and to support the State's contention. We fail to see that it has any bearing on this case. The decision in that case did not change or modify the established rule as to the power of the Land Department in approving lieu selections.

The case arose out of erroneous action by local land office officials in rejecting a lieu selection application tendered by Daniels and permitting subsequent entries to be made by others under various laws. The Land Department repeatedly instructed the local land office to allow the lieu selection application, but this was not done. When the matter was before the Secretary upon an appeal from a ruling of the Commissioner of the General Land Office that the lieu application was valid, and directing that it be allowed, the Secretary found the filing regular and that it should have been allowed; but, in view of the allowance of the subsequent entries, held (p. 556):

> It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition.

See *Hoyt* v. *Weyerhauser et al.* (161 Fed. Rep. 324.)

All that was held in *Daniels* v. *Wagner* was that there was no discretion in the Secretary to deny a right to which one had become entitled. It will be observed that the Secretary had ruled that Daniels' application was regular and *should have been allowed.*

But there is a wide difference between the right to have a tendered filing go to record and the right to have it approved. The question in the case at bar is not whether the State's application was prior, in point of time or right, to another seeking the same land as that *selected* by the State, there has been no adjudication by the Secretary that the State should have the land selected and that the exchange should be made; in other words, no approval has been given, but on the contrary approval has been refused. Had the Secretary approved the application and after such approval had assumed the right to dispose of the selected land to another, the case would fall within the principle announced in *Weyerhaeuser* v. *Hoyt*, *supra*, and adopted in *Daniels* v. *Wagner*, that the filing which is first in time is first in right.

Referring to the *Cosmos* case, the court in its opinion in *Daniels* v. *Wagner* said (pp. 560, 561):

> In the first place, we can discover no reason for holding that the *Cosmos Case* either expressly or by any reasonable implication sustained the assumption that there existed in the Land Department in the case

of lieu land entries or any other the vast latitude of discretion involved in the proposition which was sustained. It is true in the *Cosmos Case* it was decided that courts would not interfere with the right of the Department to pass upon a question which it had the power to decide as a prerequisite to allowing a lieu entry under the Act of 1897, but that ruling has no relation to the question of the right of the Department after it had passed on the prerequisites required for the entry under the Act of 1897 and after it had decided that they had all been complied with, to deny the right of the applicant to enter and under the theory of a discretion possessed to permit a later applicant to take the land, thus depriving the first applicant of the right conferred upon him by the Act of Congress. The difference between the two is that which must obtain between the power to decide on the one hand whether the prerequisites to an entry exist and the right on the other of the Land Department after finding that an applicant has fully complied with the law and is entitled to make the entry which he asks, to permit somebody else to enter the land under the assumption that the law vests a discretion which enables that to be done.

It is true again that in the *Cosmos Case* the court declined to hold that the Department was not at liberty to determine the question as to the mineral character of the lands sought to be entered because that inquiry arose after entry and before its

> final allowance, a ruling which but in a different form illustrates the broad distinction which we have just pointed out. It is also true that *Weyerhaeuser* v. *Hoyt* concerned a question of the selection of indemnity lands by a railroad company under a railroad grant, but the reasoning in that case, we are of opinion, in the very nature of things is repugnant to the possibility of the possession of the discretionary power in the Department here asserted.

It is said, however, on behalf of the State that the relinquishment or "quitclaim" divested it of title to the base land and vested it in the United States. But the mere tendering of the deed would not be sufficient to pass the title. As was said in *Roughton* v. *Knight*, 219 U. S. 537, 547: "Manifestly there must be an acceptance of the relinquishment by some one authorized to decide upon its sufficiency."

It is well settled that mere delivery is not sufficient to pass title under a deed of conveyance; there must be an acceptance by the grantee. *Kochler* v. *Hughes*, 148 N. Y. 507, 514; *Meigs* v. *Dexter*, 172 Mass. 217, 218; *Moore* v. *Flynn*, 135 Ill. 74, 79, 80; *Bremmerman* v. *Jennings*, 101 Ind. 253, 256.

The Court of Appeals in this connection misread and misquoted the statute involved. Section 2275, R. S.; U. S. Comp. Stats. 1916 Ann., §4860. In its opinion (R. 48; 258 Fed. 981), the court said:

> The statute explicity provides that the *filing of such a selection* "shall be a waiver"

> of the right of the State to the base land. [Italics ours.]

The statute reads: "the *selection* * * * shall be a waiver of its right." [Italics ours.] 26 Stat. 796.

The word "selection" clearly must mean *approved selection*. As we have already pointed out (page 13), there is a distinction between an *application to select and a selection*. The word *selection* in the statute clearly means *approved selection*.

It is asserted that the State is prejudiced by the action of the Secretary because if his action is permitted to stand it will deprive the State of its rights under the land grant, will impose conditions not provided by the grant, and will impair and diminish the value of its grant. We fail to see how these results will follow. The State retains the base land which it offered and which passed to it under its grant; it therefore has sustained no loss in that respect. Moreover, in rejecting the selection here involved, the Secretary did so without prejudice to the right of the State to cure the defect in its selection by the substitution of new and acceptable base.

It is also asserted that the action of the State in filing its selection list constituted an acceptance by it of the offer of the Government to make an exchange, and that created a contract between it and the United States. If the matter be treated as a contract it must not be forgotten that the contract was entered into by

the State with full notice that before it could be fully executed there must be an acceptance and *approval* by the Secretary of the Interior. Having entered into the contract with that knowledge, the State can not complain if the approval of the Secretary was withheld on grounds within the purview of the statute.

III.

The United States is a necessary party to this suit since the effect of the decree below is to divest it of title to the land in controversy.

The decree of the District Supreme Court (R. 43, 44), which was affirmed by the Court of Appeals, permanently enjoined the Secretary of the Interior and the Commissioner of the General Land Office from enforcing their rulings and decisions adverse to the selection, and further commanded them to recognize, respect, and give full legal force and effect to the State's selection, without regard to the proclamation eliminating the base lands from the Alamo National Forest.

The effect of this decree, if sustained, would be to divest the United States of the title to land now held by it. As the United States was not a party to the suit and had not consented to be sued, the decree was erroneous since the suit was in effect one against the United States. The case, therefore, falls within the rulings of this court in *Louisiana* v. *Garfield*, 211 U. S. 70, and *New Mexico* v. *Lane*, 243 U. S. 52.

In the latter case, an original suit in this court, the bill sought an injunction against the Secretary of the

Interior restraining him from issuing a patent to one Keepers for certain lands which he had applied to purchase under the coal land laws, and to which the Secretary of the Interior had adjudged him entitled as against the State which claimed the land as inuring to it under the school-land grant.

In sustaining a motion to dismiss, one of the grounds of which was that the suit was in effect one against the United States, the court said (p. 58):

> The motion should be granted on the ground that the suit is one against the United States, under the authority of *Louisiana* v. *Garfield*, 211 U. S. 70. In that case a bill was brought in this court to establish the title of the State of Louisiana to certain swamp lands which it claimed under the statutes of the United States and to enjoin the Secretary of the Interior and other officers of the Land Department from carrying out an order making different disposition of the land.
>
> Under the statute it was contended the land vested in the State in fee simple, that is, the act was contended to have the same character and efficacy as the Act of June 21, 1898, is asserted to have in the case at bar. And certain facts were necessary to be determined as elements of decision. This court said that in the case there were questions of law and of fact upon which the United States would have to be heard. So in the present case there is a question of law whether the Act of June 21, 1898, had the quality as a grant of the land asserted of it, whether of

itself or because of its terms or their prior construction and its adoption, indeed, whether there was such a prior construction or its adoption, and again of the fact of the character of the land at the time of the grant and the evidence of it and the knowledge of it.

CONCLUSION.

It therefore follows that the decrees of the courts below were erroneous, should be reversed; and the case remanded to the Supreme Court of the District of Columbia with directions to dismiss the bill.

Respectfully submitted.

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○